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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

DANNY D. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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HOLT

QUESTION PRESENTED FOR REVIEW

Whether Petitioner Danny D. Smith was sentenced in violation of his rights to due process and a fair trial under the Fifth and Sixth Amendments when the district court applied a two-level enhancement for possession of a weapon under sentencing guideline 2D1.1 when the possession or use of a weapon was not charged in the Indictment, submitted to a jury, and proved beyond a reasonable doubt.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Jurisdictional Statement 1

Constitutional Provisions 1

Statement of Facts 4

Reasons for Granting the Writ 10

I. Mr. Smith Was Sentenced in Violation of His Rights to Due Process and a Fair Trial under the Fifth and Sixth Amendments When the District Court Applied a Two-level Enhancement for Possession of a Weapon under Sentencing Guideline 2D1.1 When the Possession or Use of a Weapon Was Not Charged in the Indictment, Submitted to a Jury and Proved

Beyond a Reasonable Doubt 10

Conclusion 16

APPENDIX

Eighth Circuit Order and Judgment (12/20/00) 1a

Excerpts from Transcript of Hearing Before the Honorable Kathryn H. Vratil United States District Judge in Case No. 98-20034-01 (4/10/00) . . . 11a

Indictment (5/20/98) 15a

TABLE OF AUTHORITIES

Cases:

Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) 11, 12, 13, 14

United States v. Smith, Case No. 00-3122 (December 22, 2000) 1, 9

Statutes:

21 U.S.C. § 841(a)(1) 4

21 U.S.C. § 841(b)(1)(B) 4

28 U.S.C. § 1254 1

OPINIONS BELOW

The December 22, 2000, Panel Opinion of the United States Court of Appeals for the Eight Circuit affirming Petitioner Smith's sentence is not reported. *United States v. Smith*, Case No. 00-3122 (Eighth Circuit, December 22, 2000); 2000 U.S. App. LEXIS 33657. The Eighth Circuit's Opinion is included in Petitioner's Appendix, along with the district court's oral order at the sentencing of Petitioner.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its Opinion on December 22, 2000. Under Supreme Court Rule 13.1, this Petition for Writ of Certiorari is timely filed within the 90-day period. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V to the Constitution of the United States is as follows:

> No person shall be held to answer for a capital, or otherwise infamous

> crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI to the Constitution of the United States is as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

> compulsory process for obtaining witnesses in his favor, and to have the Assistance of his Counsel for his defense.

Section 2D1.1 of the United States Sentencing Guidelines states in relevant part:

Section 2D1.1. Unlawful manufacturing, importing, exporting, or trafficking (including possession with intent to commit these offenses); attempt or conspiracy. . .

(b) Specific offense characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by two levels.

STATEMENT OF FACTS

On May 20, 1998, an indictment charged Appellant/Defendant Danny D. Smith with one count of intentionally distributing "approximately 14 grams" of crack cocaine in violation of 21 U.S.C. § 841(a)(1) and two counts of intentionally possessing with intent to distribute crack cocaine in violation of 21 U.S.C. § 841(a)(1). See Appendix the amount stated in Count II was 14.6 grams; the amount stated in Count III was 35 grams. Id.

On January 21, 2000, Smith pled guilty in the district court of Kansas to Count III, possession with intent to distribute cocaine base (crack cocaine) in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). The district court accepted his plea. Under the terms of a plea agreement, the government agreed to: recommend a reduction in the offense level for acceptance of responsibility; recommend sentencing at the low end of the guideline range; and dismiss Counts I and II at the time of sentencing. See Appendix. Although the government agreed to dismiss Counts I and II, the plea agreement also provided that the drug amounts stated in those counts "will be included in the calculation of the Guideline range as relevant conduct."

In the written plea agreement, Defendant Smith agreed that the government could produce evidence of the following:

> At approximately 9:30 p.m. on May 4, 1998, the search warrant was executed by members of the Kansas City, Kansas Police Department S.C.O.R.E. Unit along with KCKPD narcotics officers. As the warrant was being served, two subjects attempted to exit the house by way of the rear door of the residence. One subject was detained while another subject, later identified as Danny D. Smith, ran out the rear door and ran toward the front of the house where he was taken into custody in the yard on the east side of the residence. When the defendant was taken into custody, he attempted to drop 27 grams of crack cocaine on the ground which was immediately secured for evidence. When the defendant was searched, he was found to be wearing a bullet proof vest, had 8.1 grams of crack cocaine on his person, as well as $7,342.00 in United States currency.

The plea agreement contained no language or provision concerning the presence or absence of a firearm or whether Mr. Smith should receive a sentencing enhancement for the presence of a firearm. The indictment also contained no mention of a firearm.

The pre-sentence investigation report (PSI) assigned Mr. Smith a base offense level of 32 (based on 63.7 grams of crack cocaine, as stated in the Indictment) and applied a three-level reduction for acceptance of responsibility. The PSI also assigned, however, a two-level increase to Mr. Smith for possession of a firearm in relation to a drug offense pursuant to U.S.S.G. § 2D1.1(b)(1), resulting in a total adjusted offense level of 31.

Defendant Smith objected to the two-level increase for possession of a firearm, both before and after issuance of the final PSI. Defense counsel argued that a 20 gauge shotgun and 9mm handgun recovered from the home of Juanita Cowans, where the drug transactions occurred, clearly belong to Ms. Cowans and should not be used to enhance Mr. Smith's sentence. *Id.* The Objection asserted that Mr. Smith had never possessed these weapons nor used them in any way in the offense. The weapon used to enhance the offense level was a

semiautomatic handgun seen on top of a washing machine near the rear door of the residence by the confidential informant (CI) who had entered the residence to engage in a drug transaction with Mr. Smith.

Rejecting Mr. Smith's arguments, the district court at the sentencing hearing applied the two-level enhancement based upon U.S.S.G. § 2D1.1(b)(1) which provides that the offense level is increased two levels if a dangerous weapon, including a firearm, was possessed.

Before applying the increase, the district court considered the arguments of counsel along with a proffer of what the evidence would show if live testimony were presented. Defense counsel stated that on April 27, 1998, Mr. Smith arrived at the residence of one Juanita Cowans. Cowans had invited Smith there to conduct a drug transaction with a person who turned out to be a CI. After a brief transaction, Mr. Smith left. The CI reported seeing a 9mm handgun lying on a washing machine somewhere in the residence. The transaction apparently had occurred in the kitchen. A week after the transaction, on May 4, 1998, a search warrant was executed at the residence of Ms. Cowans. (The search warrant was executed right after another drug

transaction allegedly involving Smith and the CI occurred at Cowans' residence). When police arrived, Mr. Smith was arrested as he was leaving the residence. A search of the residence produced controlled substances, a .20 gauge shotgun found on the Cowans' bed and a 9 mm handgun found on Cowans' dresser. Cowans and Smith were not intimately involved; he did not reside in Cowans' residence and was only a visitor there. Mr. Smith did not display or talk about the handgun seen by the CI.

The prosecutor stipulated to defense counsel's statement of the evidence, adding that the weapon was in "plain view" by the door when people entered and exited the dwelling. She also argued that Mr. Smith was wearing a bullet proof vest when he was arrested and that the test of "reasonable foreseeability" with regard to the presence of a gun was satisfied in this case.

After hearing the presentation by counsel, the district court applied the two-level sentencing enhancement, finding that there was a joint criminal enterprise between Mr. Smith and Ms. Cowans and that a gun was displayed on top of a washing machine during the drug transaction. The court further found that the transaction was in close proximity to the washing machine and was visible to the CI and Mr.

Smith. "[T]he most likely inference which the Court draws from this proximity is that there was a connection between the drug transaction and the presence of the gun."

Finding that the adjusted offense level was 31, the district court sentenced Mr. Smith to a term of imprisonment of 151 months, the midpoint of the range (135-168 months).

Mr. Smith appealed to the Eighth Circuit Court of Appeals, which affirmed his sentence. *United States v. Smith*, Case No. 00-3122 (December 22, 2000).

REASONS FOR GRANTING THE WRIT

I.

MR. SMITH WAS SENTENCED IN VIOLATION OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND SIXTH AMENDMENTS WHEN THE DISTRICT COURT APPLIED A TWO-LEVEL ENHANCEMENT FOR POSSESSION OF A WEAPON UNDER SENTENCING GUIDELINE 2D1.1 WHEN THE POSSESSION OR USE OF A WEAPON WAS NOT CHARGED IN THE INDICTMENT, SUBMITTED TO A JURY AND PROVED BEYOND A REASONABLE DOUBT

The indictment charging Mr. Smith with three drug offenses makes no mention of a gun or possession of a weapon. See Appendix. Mr. Smith challenged the two-level enhancement for firearm possession under section 2D1.1, asserting that the factual predicate for application of the guideline was not satisfied. The district court nonetheless applied the two-level enhancement, finding that the necessary facts were established by a preponderance of the evidence. See Appendix. As a matter of law, the district court's finding was insufficient to support the

two-level adjustment. The facts concerning the increase were not alleged in the indictment nor proven beyond a reasonable doubt to a jury. The facts also were not admitted by Mr. Smith as part of the factual basis for the plea. Under these circumstances, the enhancement cannot withstand constitutional scrutiny. *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

The Eighth Circuit Court of Appeals also erred in affirming the district court's sentencing conclusions. See Appendix.

In *Apprendi*, this Court noted that it had just recently "expressed serious doubt concerning the constitutionality of allowing penalty-enhancing findings to be determined by a judge by a preponderance of the evidence." *Apprendi*, 120 S.Ct. at 2353.

In *Apprendi*, the Supreme Court noted the "surpassing importance" of the due process guarantee and the right to a speedy and public trial by an impartial jury, as guaranteed by the Fifth and Sixth Amendments. Taken together, these rights "indisputably entitle" a criminal defendant to a jury determination that he is guilty of every element of the

crime with which he is charged, beyond a reasonable doubt. *Id.* at 2355 - 56.

In *Apprendi*, this Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362 - 63. The *Apprendi* majority noted that it was not striking down sentencing schemes that permit judges to exercise their discretion as to various factors relating both to the offense and the offender "in imposing a judgement *within the range* prescribed by statute." *Id.* at 2358 (emphasis in original). This Court observed that judges in this country have traditionally exercised such discretion within the statutory boundaries. *Id.*

Constitutional limits exist, however, as to the government's authority to "define away" facts necessary to constitute a criminal offense, and when a sentencing scheme keeps from the jury facts that expose defendants to greater punishment, those schemes may raise serious constitutional concerns. *Id.* at 2360. Historically, judges have been free to operate within the "limits of the legal penalties" of a particular sentencing scheme, *Id.* at 2358 and n.9.

Their discretion has otherwise been limited, however.

After carefully reviewing legal precedent and historical practice, the Apprendi Court concluded that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Id.* at 2362 - 63.

In the present case, the two-level sentencing enhancement applied to Mr. Smith violated his Fifth Amendment rights to due process and to be tried only on charges presented to a grand jury and also violated his Sixth Amendment right to a public trial before an impartial jury where all elements of the crime must be proved beyond a reasonable doubt. *See Id.; see also Jones*, 526 U.S. at 243 n.6.

The two-level enhancement increased Mr. Smith's sentencing range from 108 - 135 months to 135-168 months. This clearly was a substantial increase. Mr. Smith challenged the proposed enhancement, but his objection was overruled by the district court which concluded that the facts necessary to support the enhancement were

sufficiently proven by a preponderance of the evidence.

The application of section 2D1.1(b)(1) to Mr. Smith was constitutionally impermissible and violated his rights under the Fifth and Sixth Amendments. Although the ultimate sentence was still within the statutory range, it substantially exceeded the guideline range that otherwise would have been applicable based on the drug quantities charged in the indictment. Significantly, the federal sentencing guideline operate similarly to a statutory sentencing scheme because they severely reduce the judge's discretion outside of the guideline range. Thus, the upper limit of the guideline range is analogous to the statutory maximum and should be considered as such for purposes of applying *Apprendi*.

As noted above, the Indictment contained no charge or allegation pertaining to gun possession. The issue also was not addressed in the plea agreement. Mr. Smith was subject to the increased penalty based solely on the facts found by the judge by a preponderance of the evidence at the sentencing hearing. These facts were never considered by a jury and found beyond a reasonable doubt. Thus, the application of section 2D1.1(b)(1) to Mr. Smith violated his rights to due process, to a fair trial and to

be tried only on charges presented to a grand jury under the Fifth and Sixth Amendments.

CONCLUSION

This Court should grant Mr. Smith's Petition for Writ of Certiorari and reverse the Court of Appeals.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	
Plaintiff-Appellee,	
v.	No. 00-3122 (D.C. No. 98-CR-20034)
DANNY D. SMITH, aka Dino,	
Defendant-Appellant.	

ORDER AND JUDGMENT*

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before **SEYMOUR,** Chief Judge, **EBEL** and **BRISCOE,**
Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Defendant Danny D. Smith appeals the sentence imposed following his guilty plea to possession with intent to distribute cocaine base (crack cocaine), in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). We affirm.

I.

Smith was charged with one count of distributing crack cocaine and two counts of possessing with intent to distribute crack cocaine. Under the terms of the plea agreement, the government agreed to recommend a reduction in offense level for acceptance of responsibility, recommend sentencing at the low end of the guidelines range, dismiss counts one and two of the

indictment, and recommend that his sentence run concurrently with a state sentence. The plea agreement further provided that counts one and two would be included in the calculation of the sentence as relevant conduct.

The presentence investigation report recommended a two-level increase in Smith's sentence pursuant to U.S.S.G. § 2D1.1 because "a semi-automatic handgun was in plain view of the CI when the purchase of cocaine base was made from the defendant." Report at 6. In addition, two firearms were found in the residence where the drug transactions occurred. Smith objected to the two-level increase. The district court overruled Smith's objection to the two-level increase and calculated his base offense level as 31. Since he had a criminal history category of 3, the sentencing range was 135 to 168 months. The court sentenced Smith to 151 months' imprisonment and, over Smith's objection, ordered that the sentence run consecutively to the state offense. The court stated it was "not inclined to run this sentence concurrently" because "this offense was committed while Mr. Smith was on bond in the other criminal case" and he had "a significant amount

of other criminal conduct involving drugs that was not even computed in the criminal history score or otherwise considered." Aplt. App. at 84-85.

Smith challenges the two-level enhancement for possession of a firearm on two grounds: (1) the government did not prove by a preponderance of the evidence that he possessed the firearm; and (2) application of the two-level enhancement violated the Supreme Court's recent pronouncement in Apprendi v. New Jersey, 120 S. Ct. 2348 (2000). He also contends the district court abused its discretion in ordering a consecutive sentence.

II.

Possession of firearm

Under U.S.S.G. § 2D1.1, if, in the commission of a drug offense, "a dangerous weapon (including a firearm) was possessed," courts are required to increase a defendant's base offense level by two levels. "We review the district court's interpretation of § 2D1.1(b)(1) de novo and the court's underlying factual findings for clear error." United States v. Dickerson, 195 F.3d 1183, 1188 (10th Cir. 1999). "The government bears the initial burden of proving possession by a preponderance of the evidence."

United States v. Vaziri, 164 F.3d 556, 568 (10th Cir. 1999) (citing United States v. Smith, 131 F.3d 1392, 1400 (10th Cir. 1997)). Once the government meets its burden, "'[t]he enhancement is then appropriate unless the defendant proves the exception - that it is clearly improbable the weapon was connected with the offense.'" Id.

Smith contends the government has not met its burden by proving possession. The showing of possession may be satisfied by "showing mere proximity to the offense.'" Id. A showing of "mere proximity" is accomplished when the government "shows that a weapon was located near the general location where at least part of a drug transaction occurred." Id. At the sentencing hearing, defense counsel stipulated that the firearm was in proximity to the drugs at the time of the drug transaction and that it was in plain view. See Aplt. App. at 76. Smith makes no showing that it was clearly improbable that the firearm was connected with the offense. Instead, Smith argues the government did not show that he saw or was aware of the firearm. Actual knowledge of the firearm is not required for the enhancement to be applied. See United States v. Humphrey, 208 F.3d

1190, 1211 (10th Cir. 2000). To the extent Smith is arguing the government failed to prove he personally displayed or talked about the firearm, personal possession of the firearm is not necessary. See Smith, 131 F.3d at 1400.

Smith conceded that he had permission to use the residence for drug deals. Under U.S.S.G. § 1B1.3(a)(1)(B), the transaction qualifies as a jointly undertaken criminal activity. A defendant's base offense level can be enhanced for a jointly undertaken criminal activity on the basis of "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility of that offense." U.S.S.G. § 1B1.3(a)(1)(B). The fact that Smith wore a bulletproof vest to the residence to conduct the drug transaction indicated it was reasonably foreseeable that a firearm would be present.

Application of Apprendi

Smith argues that the two-level enhancement cannot withstand constitutional scrutiny under

Apprendi because the facts concerning the enhancement were not alleged in the indictment or proven beyond a reasonable doubt to a jury. In effect, he argues that after Apprendi, the "dangerous weapon" enhancement of § 2D1(b)(1) is more like the element of a crime than a mere "enhancement" and therefore must be constitutionally treated as such.

In Apprendi, the Court restated the rule set forth in Jones v. United States, 526 U.S. 227, 243 n.6 (1999): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt. 120 S. Ct. at 2362-63 (emphasis added). Smith concedes "the ultimate sentence was still within the statutory range." Aplt. Br. at 17.

The government correctly argues Smith's concession dooms this challenge. See United States v. Hishaw, No. 99-6258, ___ WL ___ (10th Cir. Dec. 20, 2000) (holding that "as long as defendant's sentence falls within the maximum established by statute," Apprendi is not applicable); United States v. Angle, 230 F.3d 113, 121 (4th Cir. 2000) (holding that "sentencing factors that support a specific

sentence within the statutorily prescribed penalty range are still properly submitted to a judge to be found by a preponderance of the evidence"); Talbott v. Indiana, 226 F.3d 866, 869-70 (7th Cir., 2000) (holding that even after Apprendi, "the judge alone determines drug types and quantities when imposing sentences short of the statutory maximum"); United States v. Meshack, 225 F.3d 556, 576-77 (5th Cir. 2000) (holding that as long as a defendant's sentence is within the statutory sentencing range, Apprendi does not prohibit application of a sentencing enhancement that causes a defendant to receive a higher sentence); United States v. Aguayo-Delgado, 220 F.3d 926, 933-34 (8th Cir. 2000) (same), cert. denied ___ S. Ct. ___ (Nov. 27, 2000).

Consecutive sentence

Smith contends the concurrent sentence runs afoul of the policy statement in U.S.S.G. § 5G1.3(c), which allows a court to impose a sentence "to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment *to achieve a reasonable punishment for the instant offense.*" (Emphasis added.) He argues the sentence is not a reasonable punishment.

"In general, a district court has broad discretion to sentence a defendant to a consecutive or concurrent sentence." United States v. Contreras, 210 F.3d 1151, 1152 (10th Cir. 2000). However, a § 5G1.3 limits this discretion. We review the district court's order that a sentence run consecutive to an undischarged state sentence for an abuse of discretion. See United States v. Burt, 134 F.3d 997, 1000 (10th Cir. 1998).

In calculating a "reasonable" punishment, a court should consider the factors set forth in 18 U.S.C. § 3553(a) (nature and circumstances of offense; history and characteristics of defendant; need for sentence imposed; kinds of sentences available and sentencing range; policy statement by Sentencing Commission; need to avoid unwarranted sentence disparities; and need to provide restitution to victims). See 18 U.S.C. § 3584(b); U.S.S.G. § 5G1.3 cmt. 3. The fact that the district court explicitly stated it was imposing a consecutive sentence because the "offense was committed while Mr. Smith was on bond in the other criminal case, and that he has a significant amount of other criminal conduct involving drugs that was not even computed in the criminal history score

or otherwise considered by the guidelines in this case," Aplt. App. at 84-85, indicates it considered those factors and gave thorough consideration to the matter.

In addition to being mindful that a defendant's sentence is reasonable, it is important for a court to consider the "overarching purpose of § 5G1.3 - namely, the prevention of duplicative punishment." United States v. Caraballo, 200 F.3d 20, 28-29 (1st cir. 1999). Here, there is no duplicative punishment. Smith committed the instant offense while he was on bond pending a trial for state charges.

AFFIRMED.

Entered for the Court
Mary Beck Briscoe
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA	.
	.
Plaintiff,	.
v.	. No. 98-20034-01
DANNY D. SMITH,	. April 10, 2000
	. Kansas City, Kansas
Defendant.	.

. . . . . .

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE KATHRYN H. VRATIL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Ms. Kim M. Berger
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Court Reporter: Mrs. Roberta Bishop
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Courthouse
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66101

THE COURT: Okay. The Court is going [to] overrule the defendant's objection. The Court finds that there was a joint criminal enterprise between the defendant and Rose Cowans; that the gun was displayed on a washing machine at the time of the

transaction which is in question here. The transaction was in close proximity to the washing machine and the gun was visible to the confidential informant, presumably to the defendant as well. And the most likely inference which the Court draws from this proximity is that there was a connection between the drug transaction and the presence of the gun.

That leaves us with a total offense level of 31 and a criminal history category of 3, or a sentencing range of 135 to 168 months.

. . . .

THE COURT: The Court determines that the presentence investigation report is accurate and orders that those findings be incorporated in the following sentence:

Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that you are hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 151 months. This term of imprisonment will run consecutive to any imprisonment under a prior state or federal sentence.

When you are released from prison, you will be placed on supervised release for a term of 5 years, and within 72 hours of release, you will report in

person to the Probation Office in the district to which you are released.

Also, while you are on supervised release, you will not commit another federal, state or local crime. You will comply with the standard conditions that have been adopted by the Court, and also the special conditions of supervision that I just stated.

The Court orders you to pay a special assessment of $100 to the Crime Victims Fund. Payment of that amount is due immediately and should be paid to the clerk of the Court.

The Court also orders you to pay a fine of $500, which is also due immediately and should be paid to the clerk of the Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	98-20034-01-KHV
DANNY D. SMITH,	)	
a/k/a DINO,	)	
Defendant.	)	

INDICTMENT
COUNT 1

The Grand Jury charges:

On or about April 27, 1998, in the District of Kansas,

DANNY D. SMITH
a/k/a DINO

did unlawfully, knowingly, and intentionally distribute approximately 14 grams (approximately ½ ounce) of a mixture of substance containing a detectable amount of cocaine base (crack), a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT 2

On or about May 4, 1998, in the District of Kansas,

DANNY D. SMITH,
a/k/a DINO

did unlawfully, knowingly, and intentionally possess with intent to distribute approximately 14.6 grams (approximately ½ ounce) of a mixture or substance containing a detectable amount of cocaine base (crack), a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT 3

On or about May 4, 1998, in the District of Kansas,

DANNY D. SMITH
a/k/a DINO

did unlawfully, knowingly, and intentionally possess with intent to distribute approximately 35 grams (approximately 1 ounce) of cocaine base (crack) in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL.

5/20/98 /S/

DATE FOREMAN OF THE GRAND JURY

/S/

JACKIE N. WILLIAMS
United States Attorney
District of Kansas

301 N. Main, Suite 1200
Wichita, Kansas 67202
Ks. S.Ct. No. 07333

[It is requested that trial be held in Kansas City, Kansas.]

Bond Set At: $ Detain

/S/
UNITED STATES DISTRICT JUDGE
District of Kansas